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10 IN THE UNITED STATES DISTRICT COURT  
11 FOR THE DISTRICT OF ARIZONA  
12 TUCSON DIVISION  
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15 WILDEARTH GUARDIANS,

16 Plaintiff,

17 vs.

18 UNITED STATES FISH AND WILDLIFE  
19 SERVICE and UNITED STATES FOREST  
20 SERVICE,

21 Defendants.  
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No. 13-151-RCC

**PLAINTIFF'S OPPOSITION  
TO FEDERAL DEFENDANTS'  
MOTION TO DISSOLVE  
INJUNCTION  
[ECF DOC NO. 112]**

1     **I.     Introduction**

2             Lamentably, there appears to be no bottom to the lack of accountability and the  
3     shirking of responsibility that led this Court to issue its September 12, 2019 decision and  
4     injunction in this matter. *WildEarth Guardians v. U.S. Fish and Wildlife Service* (“*WEG*  
5     *2019*”), 2019 WL 4345333 at \*11 (D.Ariz. 2019). As things stand now – with a remand  
6     order directing reassessment of jeopardy and recovery and an associated injunction in  
7     place against certain forest treatments – this Court is all that stands between continuation  
8     of the Federal Defendants’ haphazard implementation of an adaptive management  
9     approach to Mexican spotted owl (“MSO”) conservation and recovery on one hand, and  
10    the *actual* conservation and recovery of the species on the other hand.

11            In its September 12, 2019 decision, this Court provided the following crystal clear  
12    instructions to the Federal Defendants:

13                The USFS and FWS must reinitiate a formal Section 7(a)(2) consultation  
14                and formulate superceding BiOps that conform with the terms of this Order.

15                The consultation must reassess the jeopardy analysis and the effect of Forest  
16                Plans on the recovery of the MSO.

17     *WEG 2019* at \*21. In their pending Motion to Dissolve the Injunction pursuant to Federal  
18    Rule of Civil Procedure 60, the Federal Defendants (“FDs”) brazenly assert that the  
19    superceding Biological Opinion (“BiOp”) for the Cibola National Forest (“NF”) that they  
20    produced in a “lightening” Section 7 consultation “fully complie[s] with this Court’s  
21    order [of September 12, 2019].” ECF Doc. No. 112 at 1.

22            As Plaintiff WildEarth Guardians (“WEG”) explains below, nothing could be  
23    further from the truth. The no jeopardy conclusion of the superceding BiOp for the  
24    Cibola NF – which is clearly intended as a “test balloon” to probe the willingness of the  
25    Court to dissolve the injunction on the basis of meaningless and superficial conclusory  
26    assertions as to conservation and recovery – is premised on (1) an unenforceable  
27    statement of intention with respect to future long-term range-wide population monitoring,  
28    (2) unsubstantiated and misleading representations as to the FDs’ *actual* survey and  
   habitat mapping and management practices, (3) a breathtaking *sub rosa* repudiation of the

1 underpinnings of the adaptive management approach to MSO conservation and recovery,  
2 and (4) a defiant reassertion of arguments previously rejected by this Court.

3 In short, the superceding BiOp *does not* fully comply with this Court’s September  
4 12, 2019 remand instructions because it does not reassess the jeopardy and recovery  
5 analysis of the 2012 BiOps in a rational manner that passes muster under the arbitrary and  
6 capricious standard of review, and it is based on speculation and surmise rather than  
7 evidence in the record. “The institutionalized caution mandated by section 7 of the ESA  
8 requires” that an agency to refrain from taking any action “until it *insures*” that the action  
9 will not jeopardize a species. *Sierra Club v. Marsh*, 816 F.2d 1376, 1388 (9<sup>th</sup> Cir. 1987)  
10 (emphasis added), 16 U.S.C. § 1536(a)(2). That high bar has not been cleared here.  
11 WEG respectfully submits that the Motion to Dissolve must be denied.

## 12 **II. Legal standards applicable to the Federal Defendants’ Motion to Dissolve**

13 “An injunction issued by a court acting within its jurisdiction must be obeyed until  
14 the injunction is vacated or withdrawn.” *W.R. Grace & Co. v. Local Union 759*,  
15 *International Union of United Rubber*, 461 U.S. 757, 766 (1983). “A party seeking  
16 modification or dissolution of an injunction bears the burden of establishing that a  
17 significant change in facts or law warrants revision or dissolution of the injunction.”  
18 *Sharp v. Weston*, 233 F.3d 1166, 1170 (9<sup>th</sup> Cir. 2000). Rule 60 relief is improperly  
19 granted to an enjoined party that merely revisits and relies upon arguments already raised  
20 and dismissed, as the Federal Defendants do here. *Van Skiver v. United States*, 952 F.2d  
21 1241, 1244 (10<sup>th</sup> Cir. 1991). Indeed, in essence the FDs’ Motion to Dissolve is nothing  
22 more than a *third* attempt – after the merits stage and the Rule 59 proceedings – to  
23 convince this Court to accept arguments that the Court has already rejected.

24 The pending Motion to Dissolve requires this Court to determine whether the FDs’  
25 reassessment of the jeopardy and recovery analysis of the 2012 BiOp satisfies the  
26 arbitrary and capricious standard of review set by the Administrative Procedure Act  
27 (“APA”). 5 U.S.C. § 706(a)(2). This Court must inquire whether the FDs “considered  
28 the relevant factors and articulated a rational connection between the facts found and the

1 choice made.” *Natural Resources Defense Council v. Dept. of the Interior*, 113 F.3d  
2 1121, 1124 (9<sup>th</sup> Cir. 1997). The Court is required to undertake a “thorough, probing, in-  
3 depth review” of that administrative record to determine whether the remand decision is  
4 the product of rational decision-making. *Native Ecosystems Council v. U.S. Forest*  
5 *Service*, 418 F.3d 953, 960 (9<sup>th</sup> Cir. 2005). The Court should not defer to conclusions that  
6 are unsupported by the evidence or that run counter to the evidence before it. *Western*  
7 *Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 493 (9<sup>th</sup> Cir. 2010). This Court must  
8 not merely “rubber-stamp” the new analysis. *Ocean Advocates v. U.S. Army Corps of*  
9 *Engineers*, 402 F.3d 846, 859 (9<sup>th</sup> Cir. 2005).

10 With specific reference to these Rule 60 proceedings, the Court should “not lift its  
11 injunction without first finding that [the FDs’ reassessment] passes muster under the  
12 relevant environmental statutes,” and should “direct the submission of a new  
13 Administrative Record” that facilitates the court’s review of that issue. *Colorado*  
14 *Environmental Coalition v. Office of Legacy Mining*, 2016 WL 11548224 at \*1 (D.Colo  
15 2016). “Equity would not be achieved if the Court decided simply to rubber-stamp [the  
16 FDs’] unsupported self-assessment of its compliance with a court order.” *National Law*  
17 *Center on Homelessness & Poverty v. United States Veterans Administration*, 842  
18 F.Supp.2d 127, 131 (D.D.C. 2012) *see also Swan View Coalition. v. Barbouletos*, 2010  
19 WL 11530904 at \*1, 3, 5 (D. Mont. 2010) (“the completion of the new biological opinion  
20 does not automatically lift the injunction”). If the FDs’ reassessment does not correct the  
21 legal deficiencies that led the Court to impose the injunction, the Court should leave the  
22 injunction in place. *See for example Public Service Co. of Colorado v. Batt*, 67 F.3d 234,  
23 237 (9<sup>th</sup> Cir. 1995) (rejecting the notion that an injunction automatically dissolves upon  
24 issuance of a superceding environmental document since such a practice “would leave the  
25 injunction . . . toothless”), *Colorado Environmental Coalition v. Office of Legacy Mining*,  
26 2018 WL 684761 at \*1, 19 (D. Colo. 2016). The FDs’ bald and unsupported assertion  
27 that it has “fully complied” with the Court’s remand instructions is not a sufficient basis  
28 for dissolving the associated injunction.

1 A corollary of the foregoing standards and principles is the bedrock rule that a  
2 movant must make arguments – with points and authorities – that entitle the movant to the  
3 relief that it seeks. Conclusory assertions of ultimate facts and law – or of entitlement to  
4 relief – are not sufficient. This rule is reified in Local Rule 7.2(b) of the District of  
5 Arizona: “the moving party shall serve and file with the motion's papers a memorandum  
6 setting forth the points and authorities relied upon in support of the motion.” Failure to  
7 support a motion with a memorandum that complies with this requirement “in all  
8 substantial respects . . . may be deemed a consent to the denial . . . of the motion and the  
9 Court may dispose of the motion summarily.” Local Rule 7.2(i).

10 This common-sense principle – that a movant must provide argument to the Court  
11 as to why the requested relief is appropriate and should be granted – has deep roots in  
12 case law. Indeed, earlier this year, this Court refused to “formulate” arguments for a  
13 movant or to search the record for tidbits that might tend to support the movant’s position.  
14 *Bramlett v. Ryan*, 2019 WL 2744837 at \*1 (D. Ariz. 2019). As this Court aptly held in  
15 that case, “[j]udges are not like pigs, hunting for truffles buried in briefs.” *Id.* (citation  
16 omitted) *see also U-Haul Co. of Nevada v. Kamer*, 2013 WL 4505800 at \*2 (D. Nev.  
17 2013) (“the Court reminds the parties that the burden of representation lies upon them,  
18 and not upon the Court”), *AGA Shareholders v. CSK Auto, Inc.*, 2009 WL 113569 at \*2  
19 (D. Ariz. 2009) (in a summary judgment context, holding that a court “has no obligation  
20 to scour the record in search of a genuine issue of triable fact”).

21 **III. The Federal Defendant’s Motion to Dissolve is nothing more than a**  
22 **conclusory assertion that this Court must reject**

23 The FDs’ Motion to Dissolve consists of four paragraphs. The first paragraph is  
24 an introduction. The second paragraph sets out the standard of review. The third  
25 paragraph is the “argument.” And the fourth paragraph is the conclusion. The heart of  
26 the brief – the so-called “argument” contained in the third paragraph – is nothing other  
27 than the FDs’ conclusory assertion that “[t]he circumstances that originally necessitated  
28 injunctive relief are no longer present,” that “Defendants have fully complied with the

1 terms of the Court’s [September 12, 2019] order,” and that “[t]he injunction is no longer  
2 warranted and should be dissolved.” ECF Doc. No. 112 at 2-3. However, the Motion to  
3 Dissolve does not discuss the substance of the superceding BiOp, does not discuss how  
4 the superceding BiOp for the Cibola NF differs from the 2012 BiOp at issue in this case  
5 in any way that is relevant to the judge’s remand instructions, and certainly does not even  
6 endeavor to explain – in any way, shape, or form – how the superceding BiOp “fully  
7 complies” with this Court’s instructions, or insures against jeopardy and the diminution of  
8 recovery prospects for the MSO.

9       Apparently, the FDs expect that this Court – upon its review of the superceding  
10 BiOp – will “formulate” the arguments that they might have made themselves in support  
11 of the Motion to Dissolve, if indeed any such valid arguments exist. WEG respectfully  
12 submits that this Court, in line with the governing Local Rules of the District of Arizona  
13 and in line with the unanimous case law on this issue, should refuse to act as the FDs’  
14 counsel by hypothesizing as to what arguments the FDs might have made if they had  
15 discharged their obligation to make their arguments themselves. This is not the way that  
16 litigation works, and this approach is simply inconsistent with well-settled requirements  
17 of motion practice. In the first instance, the FDs – who bear the burden of proof on their  
18 Motion to Dissolve – must make their arguments with respect to their compliance with  
19 this Court’s remand instructions, and WEG should be given an opportunity to respond to  
20 those arguments. Instead, the FDs apparently expect that both the Court and WEG will  
21 act as the proverbial “pigs” who will snuffle through the record in this case in search of  
22 some truffle morsel that might tend to support their conclusory assertion as to “full  
23 compliance.” This Court should decline this invitation, and should hold the FDs to their  
24 burden.

25       And even if this Court were inclined to take on the role of FDs’ counsel in this  
26 case, there is simply not an adequate basis upon which this Court could conceivably  
27 discharge its obligation to give the record the “thorough, probing, in-depth review” that is  
28 required by the relevant standard of review. Indeed, there is no record at all. The

1 superceding BiOp itself sets out the following “consultation history”:

- 2 ● September 12, 2019: In response to litigation (i.e., court order 4:13-cv-00151-RCC), the [Fish and Wildlife] Service began to re-analyze  
3 the effects of the proposed action and our analysis of the proposed  
4 actions’ effect on owl recovery to address the Court’s findings.
- 5 ● October 20, 2019: We [the Fish and Wildlife Service] received the  
6 updated BA from the Forest Service.
- 7 ● October 28, 2019: We [the Fish and Wildlife Service] sent a draft  
8 BO to the Forest Service for your [the Forest Service’s] review.
- 9 ● October 29, 2019: We received your [the Forest Service’s]  
10 comments on the draft BO and incorporated comments.

11 ECF Doc. No. 112-1 at 2. While the superceding BiOp references various analyses and  
12 communications which supposedly took place in connection with its development, not a  
13 single shred of that material has been compiled into an administrative record for the  
14 review of the Court and WEG. Even the Forest Service’s October 20, 2019 Biological  
15 Assessment – which is the foundational document that sets the stage for the U.S. Fish and  
16 Wildlife Service (“FWS”) in the preparation of a superceding BiOp pursuant to ESA  
17 Section 7(a)(2), and which describes the action that is the subject of the Section 7(a)(2)  
18 consultation – has not been produced to the Court.

19 In the complete absence of (1) any effort by the FDs to articulate even a single  
20 argument in support of their assertion that they have fully complied with this Court’s  
21 remand instructions and (2) any administrative record that would provide the Court with  
22 an opportunity to review the FDs’ assertion as to that full compliance, the Motion to  
23 Dissolve must be denied. WEG respectfully submits that any other result would be  
24 nothing more than a “rubber-stamp [on] an enjoined party’s unsupported self-assessment  
25 of its compliance with a court order.” *National Law Center*, 842 F.Supp.2d at 131.

#### 26 **IV. The superceding BiOp does *not* demonstrate full compliance with this Court’s 27 remand instructions**

28 Based on its review of the superceding BiOp, WEG has endeavored to discern  
what the FDs might have argued in support of their Motion to Dissolve – if they had  
many any arguments at all. It appears that FDs would likely attempt to carry their burden

1 with a two-pronged approach. First, they would likely argue that they are insuring against  
2 jeopardy by conducting the long-term range-wide MSO population monitoring that was a  
3 condition of the 1996 and 2005 BiOps, but that was not required by the 2012 BiOps or the  
4 superceding BiOp. Second, they would likely argue that even if they were not conducting  
5 that monitoring, the omission would be immaterial since they are taking other measures to  
6 insure against jeopardy and the diminution of the MSO's prospects for recovery, and that  
7 these other measures support a rational no jeopardy conclusion. These hypothetical  
8 arguments would fail on both accounts.

9 **A. There is still no requirement for long-term range-wide population**  
10 **monitoring**

11 In the superceding BiOp for the Cibola NF, the FDs attempt to straddle a line with  
12 respect to the core issue that led this Court to decide two of WEG's claims in its favor.  
13 On one hand, in the superceding BiOp the FWS lauds the U.S. Forest Service ("USFS")  
14 for conducting long-term range-wide population monitoring as an "encouraging  
15 conservation measure" "which will contribute to recovery of the species by allowing the  
16 Service to assess the status of MSOs on NFS lands and evaluate the effectiveness of the  
17 [2012 Revised] Recovery Plan management recommendations on those lands."<sup>1</sup> ECF  
18 Doc. No. 112-1 at 24. On the other hand, the FDs state that the FWS's omission of a  
19 mandatory requirement for the funding and implementation of such monitoring from the  
20 superceding BiOp for the Cibola National Forest is not material to its jeopardy and  
21 recovery analysis. *Id.*

22 These statements present two problems for the FDs, and they do support either a  
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24 <sup>1</sup> The superceding BiOp's characterization of the Cibola NF's population  
25 monitoring as a "conservation measure" is a serious misrepresentation. "Conservation  
26 measure" is a term of art under the ESA, and refers to component parts of a federal action  
27 that are "pledged in the project description," and "their implementation is required under  
28 the terms of the consultation." Exhibit 1, *Center for Biological Diversity v. U.S.B.L.M.*,  
698 F.3d 1101, 1113-14 (9<sup>th</sup> Cir. 2012). As this Court know, the USFS strenuously  
refuses to make any "pledge" with respect to the funding and implementation of long-  
term range-wide MSO population monitoring.

1 rational no jeopardy conclusion or a determination that the FDs have reasonably  
2 reassessed their prior jeopardy analysis. First, it is *still* the case that the USFS has not  
3 affirmatively and definitely committed to long-term funding and implementation of the  
4 population monitoring program specified in the 2012 Revised Recovery Plan (“RP”).  
5 Instead, it funds the monitoring on an annual basis and could terminate funding and/or  
6 participation in the monitoring program at any time. ECF Doc. No. 112-1 at 22 (the  
7 superceding BiOp states that the USFS “intends to fund” the monitoring in the future, but  
8 does not require it), Exhibit 2 (counsel for the USFS acknowledges that there is no long-  
9 term funding commitment). This Court has already held that statements of intention like  
10 this are not sufficient to support a no jeopardy BiOp. *WEG 2019* at \*12 *citing Center for*  
11 *Biological Diversity v. Rumsfeld*, 198 F.Supp.2d 1139, 1154 (D.Ariz. 2002) *see also*  
12 *National Wildlife Federation v. National Marine Fisheries Service*, 524 F.3d 917, 935-36  
13 (9<sup>th</sup> Cir. 2008) (holding that no jeopardy conclusions must be premised on “specific and  
14 binding plans” and a “clear, definite commitment of resources,” and further holding that  
15 even a “sincere general commitment” to take some future measure is an insufficient basis  
16 for a no jeopardy BiOp). Without a firm and definite requirement that the USFS fund and  
17 implement long-term range-wide MSO population monitoring as part of the adaptive  
18 management program for MSO conservation and recovery, there is no insurance against  
19 jeopardy.

20 Second, the FDs’ position – insofar as it can be gleaned from the superceding  
21 BiOp and without actual argument – is that long-term range-wide MSO population  
22 monitoring is simply not essential to the implementation of the adaptive management  
23 program for MSO conservation and recovery that the FDs purport to implement. As  
24 WEG has previously demonstrated to the Court, and as this Court has previously held,  
25 this approach does not insure against jeopardy. Furthermore, this position reflects a  
26 marked departure from the FWS’s position in the 1996 and 2005 BiOps which both  
27 required range-wide population trend monitoring as a condition of the no jeopardy  
28 conclusion. This significant change has not been adequately explained by the FDs. When

1 an agency changes a position on an issue, a “reasoned explanation for its action would  
2 ordinarily demand that it display awareness that it is changing position.” *F.C.C. v. Fox*  
3 *Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The FDs are not acting with this sort  
4 of transparency and candor here. To the contrary, at oral argument on their Rule 59  
5 motion, counsel for the FDs represented to the Court – contrary to the record and prior  
6 judicial decisions on the issue – that the 1996 and 2005 BiOps did *not* contain a  
7 requirement for long-term range-wide population monitoring. This is hardly the start of a  
8 “reasoned explanation;” instead it is further obfuscation and lack of accountability.

9 **B. The Cibola NF’s informal owl surveys do not stand in for long-term**  
10 **range-wide population monitoring**

11 In part, the superceding BiOp for the Cibola National Forest states that the FWS’s  
12 no jeopardy conclusion is rational – despite the absence of a requirement for long-term  
13 range-wide population monitoring – because the USFS “conducts surveys for individual  
14 owls.” ECF Doc. NO. 112-1 at 23. This Court already addressed this issue in its  
15 September 12, 2019 decision, and held that MSO detections resulting from surveys  
16 cannot reasonably lead to any conclusions about jeopardy and recovery. *WEG 2019* at  
17 \*11. If the FDs nonetheless persist in making the argument that owl surveys correct the  
18 defect that led the Court to its September 12, 2019 decision, the argument would fail for  
19 two reasons.

20 First, and as WEG has previously explained to this Court, pre-project surveys for  
21 individual owls in discrete planning areas can – if the surveys are rigorously conducted  
22 pursuant to a detailed protocol developed by the FWS – detect resident MSOs in a project  
23 area. However, such surveys do not provide any useful information that would help the  
24 FDs insure against jeopardy and the diminution of the MSO’s recovery prospects. In the  
25 2012 BiOps, the FWS was clear on this point when it stated that MSO surveys “can  
26 provide information regarding the presence or absence of MSOs in a specific area (and is  
27 used to establish PACs, etc.), but does not provide population level indicators of the  
28 species general population trend.” AR-FWS at 7578. The BiOps go on to acknowledge

1 that MSO survey data does not provide any useful information as to MSO “abundance,”  
2 which is the key metric that must be monitored if the FDs are to succeed in their  
3 purported plan to insure MSO conservation and recovery through implementation of an  
4 adaptive management program. *Id.* (the FWS states that “an increase in abundance in the  
5 species range-wide cannot be inferred from these data”) *see also* AR-FS 9855 (the FWS  
6 states the MSO survey does not capture MSO population trends).

7 Second, even if pre-project MSO surveys did provide information that is useful to  
8 the jeopardy and recovery analysis – which is *not* the case, as explained above – the  
9 survey data acquired by the Cibola National Forest is largely unscientific and unreliable.  
10 The FDs have failed to disclose to the Court the important limitations of their data. The  
11 2012 Revised RP confronts head-on some of the difficulties in making successful  
12 detections during MSO surveys, and sets out a detailed “Survey Protocol” which  
13 “expresses the FWS’ scientific opinion on adequate owl survey methods.”<sup>2</sup> The Protocol  
14 provides specific guidelines on such issues as the number and spacing of “calling points”  
15 needed to assure full coverage of a survey area, the timing interval and seasonality of  
16 surveys, the number of visits that should be made to each “calling point,” and so forth.  
17 AR-FS 9855-67. The most recent version of the Cibola NF Annual Monitoring and  
18 Evaluation Report makes it apparent that MSO surveys in the Cibola NF – to the extent  
19 they are conducted at all – fall far short of these standards. Exhibit 3 (admitting that  
20 most MSO surveys on the Ciboia NF are “informal” and/or limited in geographic scope  
21 and coverage). The Cibola NF’s owl surveys are not conducted to the level recommended  
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23 <sup>2</sup> To be clear, WEG is *not* suggesting that the FWS must incorporate into its  
24 BiOps a requirement that the USFS conduct MSO surveys according to Protocol. WEG’s  
25 specific and limited point on this issue is that insofar as MSO surveys – and the data  
26 acquired thereby – are to serve any useful purpose at all, they must be conducted  
27 according to the Protocol. The results of less rigorous surveys are unreliable and cannot  
28 be counted on to detect the presence of all MSOs in the survey area. For this reason, the  
2012 Revised RP – in every instance in which it discusses MSO surveys – specifically  
cautions that MSO surveys should be conducted to Protocol if and when they are used to  
guide management decisions. AR-FS 9629, 9816-17, 9829, 9842, 9848.

1 by the FWS Protocol, and cannot support a no jeopardy BiOp.

2 **C. PAC designation and protection does not cure the deficiency**

3 The FDs might argue that their designation and protection of 600 acres of  
4 nest/roost habitat around known MSO sites is an adequate substitute for implementation  
5 of the adaptive management program, and therefore supports a rational no jeopardy  
6 conclusion in the superceding BiOp and insures against diminution of the MSO's  
7 recovery prospects. ECF Doc. No. 112-1 at 23. This argument would fail.

8 First, the 2012 Revised RP plainly states that the protection of known MSO nest  
9 sites in PACs is not adequate to assure the survival and the recovery of the MSO for three  
10 reasons: (1) the home ranges of individual MSOs are "considerably larger" than 600  
11 acres, (2) MSOs use areas outside of their usual home ranges during certain periods of  
12 their life cycle, and (3) recovery of the species will require the protection of non-PAC  
13 nesting/roosting habitat to support an increasing population. AR-FS 9820-21. It is  
14 simply not the case that jeopardy can be avoided and recovery prospects maintained by  
15 protecting PACs, in the absence of the designation and management of Recovery Habitat  
16 at a landscape scale.

17 Second, and as explained above, the MSO survey effort on the Cibola National  
18 Forest is largely "informal," ad hoc, and incomplete. It does not rise to the level of MSO  
19 surveys recommended by the 2012 Revised RP. This means that many MSOs on the  
20 Cibola NF are likely to evade detection during pre-project surveys, and are therefore  
21 susceptible to harassment and/or mortality because their existence and whereabouts are  
22 unknown at the time that the USFS implements forest treatments.

23 **D. Recovery Habitat has not been identified and managed on a landscape-**  
24 **level scale**

25 Another argument that the FDs would likely make in support of their Motion to  
26 Dissolve is that the no jeopardy conclusion of the superceding BiOp is rational because  
27 the USFS "identified and is managing for future Mexican spotted owl nest/roost habitat"  
28 on the Cibola NF. ECF Doc. No. 112-1 at 23. Again – as with the MSO survey data

1 justification – this Court has already specifically addressed this issue, and has found it  
2 wanting. In its September 12, 2019 decision, this Court addresses at length the FDs’  
3 contention that habitat management justifies the FWS’s decision to excise a long-term  
4 range-wide MSO population monitoring requirement from BiOps associated with forest  
5 management in Arizona and New Mexico. This Court held that “habitat monitoring . . . is  
6 not an adequate measure of recovery,” and that “the conclusion that simple habitat  
7 protection . . . will lead to recovery is not reasonable.” *WEG 2019* at \*11, 12.<sup>3</sup>

8 Furthermore, even if habitat management was a sufficient way in which to insure  
9 against jeopardy and the diminution of recovery prospects for the MSO – which is not the  
10 case, as this Court has previously held – the superceding BiOp for the Cibola National  
11 Forest omits a crucial fact. The 2012 Revised RP urgently recommends the identification  
12 and mapping of nest/roost Recovery Habitat so that the USFS can manage MSO habitat  
13 on a landscape scale. AR-FS 9629, 9821-22 (stating that “landscape modeling and  
14 analysis [of Recovery Habitat] are critical” and that “the landscape should be managed to  
15 sustain owl nesting/roosting habitat that is well-distributed spatially”). The intent of this  
16 guideline is “to maintain and develop nesting and roosting habitat now and into the  
17 future.” AR-FS 9821. However, the USFS did not create landscape-level MSO Recovery  
18 Habitat maps until October 24. In response to an e-mail inquiry of September 16, 2019  
19 from the undersigned to counsel for FDs, WEG learned of this crucial failure. Exhibit 4.  
20 To make sure that there was no misunderstanding as to the *non-existence* of the Recovery  
21 Habitat maps which are deemed crucial by the FWS, the undersigned sought confirmation  
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24 <sup>3</sup> In an effort to preempt further semantic sniping on the “route to recovery”  
25 issue upon which the FDs have been hanging their hat in post-merit proceedings, WEG  
26 points out here that Section 7(a)(2) of the ESA requires the FDs to “insure” against  
27 jeopardy, and that this requirement means that the FDs are prohibited by the ESA from  
28 taking any action that impairs a listed species’ prospects for recovery. “An agency's  
failure to adequately consider recovery needs in its adverse modification or jeopardy  
analysis renders the agency's determination arbitrary and capricious.” *Northwest  
Environmental Advocates v. U.S.E.P.A.*, 855 F.Supp.2d 1159, 12232 (D.Ore. 2012).

1 on October 7, 2019 as to the maps' status. Exhibit 5. Counsel for the USFS confirmed  
2 that the Recovery Habitat maps "are still in development and not available." *Id.*

3 The superceding BiOp's assertion that the no jeopardy conclusion is in part  
4 justified on the Cibola NF's on-going identification and management of MSO habitat is a  
5 blatant misrepresentation of fact. In actual reality, the USFS did not prepare *any* MSO  
6 Recovery Habitat maps (at least to the specifications recommended by the 2012 Revised  
7 RP) until October 24, 2019. On that date – and apparently because the FDs perceived a  
8 vulnerability in this litigation after the issue was raised by WEG, and *not* because of any  
9 regard for the MSO's conservation needs or the recommendations of the 2012 Revised  
10 RP – the USFS prepared a map entitled "Potential MSO Habitat Areas" for the Cibola  
11 National Forest. Exhibit 6. Such a belated and half-baked effort at mapping and  
12 managing crucial Recovery Habitat for the MSO on a landscape-level scale cannot  
13 reasonably support a no jeopardy conclusion.

14 **E. The superceding BiOp is tantamount to a repudiation of adaptive**  
15 **management and relies on untested assumptions as to impacts**

16 As WEG has previously explained to the Court, any claims that the FDs make  
17 regarding the "net beneficial" effect of forest treatments on the population trend of MSOs  
18 and MSO habitat are sheer speculation and surmise, and cannot reasonably stand in for  
19 implementation of a rigorous and robust adaptive management program based on  
20 population monitoring. The superceding BiOp sets the stage for such an argument. ECF  
21 Doc. No. 112-1 at 27 (speculating and surmising as to the impacts of "restoration"  
22 treatments and asserting without any corroborating scientific evidence that such  
23 treatments will "protect[] and maintain[]" MSOs and their habitat). On this point, WEG  
24 again directs this court to the 2012 Revised RP:

25 **Empirical data on the effects of thinning and other mechanical forest**  
26 **treatments on [MSO] are nonexistent. This is unfortunate, because**  
27 **thinning and other mechanical forest treatments are emphasized**  
28 **heavily in plans for landscape-restoration of southwestern forests, and**  
**these activities could affect large areas of [MSO] habitat.** Consequently,  
understanding how these treatments affect [MSOs] is one of the major  
questions faced in integrating recovering this owl with plans for restoring  
southwestern forests. **Although this has been clearly noted for years, no**

1       **studies on this topic have been funded to date.**

2       As noted earlier, empirical data on effects of forest treatments on spotted  
3       owls are sparse and difficult to interpret. **Although all of the studies**  
4       **discussed above individually present limits to interpretation,**  
5       **collectively they suggest that at least some kinds of mechanical forest**  
6       **treatments may negatively impact spotted owls.** No clear guidance  
7       emerges from these studies relative to types, extents, or spatial arrangement  
8       of treatment that might minimize impacts to owls. **Such information is**  
9       **badly needed if management is to proceed in owl habitat. Some**  
10       **treatments may have beneficial or neutral effects, but we do not know**  
11       **which types and intensities of treatments may be beneficial, neutral, or**  
12       **harmful.**

13       AR-FS at 9759, 9761 (emphasis added). The FDs appear to believe that this Court will  
14       (1) simply gloss over the fact that there is no empirical data that validates their  
15       assumptions as to the net beneficial effect of so-called “restoration treatments,” and (2)  
16       simply rubber-stamp their unsubstantiated assertion that the implementation of such forest  
17       treatments insure against jeopardy and do not impair recovery.

18       The 2012 Revised RP is candid as to the cause of the “unfortunate” lack of  
19       information regarding the impacts of “restoration treatments”: while the lack of  
20       information “has been clearly noted for years,” “no studies on this topic have been funded  
21       to date.” *Id.* If this Court were to blindly accept the FDs’ bald assertion as to the net  
22       effect of “restoration treatments” and dissolve the injunction on that basis, the FDs would  
23       reap an undeserved windfall from their decades of institutional negligence that would  
24       ultimately redound to the harm of the MSO and its habitat. WEG urges this Court to  
25       avoid this result, and to instead send the opposite message to the FDs: that Congress  
26       meant what it said when it stated that Section 7(a)(2) “give[s] the benefit of the doubt to  
27       the species” and that an action agency bears the burden “to demonstrate that . . . its action  
28       will not violate” the jeopardy and recovery requirements of that statute. H.R. Conf. Rep.  
No. 697, 96th Cong., 2nd Sess. 12 (1979) (reprinted in 1979 U.S.Code Cong. &  
Admin.News 2572, 2576).

What is truly disheartening about the current state of affairs is that the FDs appear  
ready to jettison – kit and caboodle – the entire MSO adaptive management program *sub*  
*rosa*. The superceding BiOp brazenly states that “the results of population trend data

1 would not likely inform our decisions . . . as it relates to the continued implementation of  
2 the Cibola NF [Forest Plan].” ECF Doc. No. 112-1. This statement is striking, as  
3 acquiring and applying information from long-term range-wide population monitoring to  
4 inform management decisions is precisely the point of adaptive management.<sup>4</sup> Indeed,  
5 even the superceding BiOp states that the results of a long-term range-wide population  
6 monitoring program would “contribute to recovery of the species by allowing the Service  
7 to assess the status of MSOs on NFS lands and evaluate the effectiveness of the [2012  
8 Revised] Recovery Plan management recommendations on those lands.” ECF Doc. No.  
9 112-1 at 24. The inconsistency of these two positions in the same BiOp concerning the  
10 utility, purpose, and crucial importance of MSO population trend monitoring is head-  
11 spinning and irrational. WEG respectfully submits that the FDs’ effort to disavow the  
12 essential underlying logic of the adaptive management approach – which is depressingly  
13 and plainly apparent in the superceding BiOp for the Cibola NF – should be denounced  
14 and rejected by this Court. Such institutionalized *incaution* is impermissible.

15 **V. WildEarth Guardians should be permitted to conduct discovery prior to**  
16 **responding to any future Motion to Dissolve filed by Federal Defendants**

17 As discussed above at the outset of this memorandum, the FDs’ Motion to  
18 Dissolve must be denied for three simple reasons: the FDs (1) have failed to carry their  
19 burden of proof, (2) have failed to provide this Court with any argument in support of  
20 their motion that goes beyond a conclusory assertion of “full compliance,” and (3) have  
21 failed to compile and lodge an administrative record that would facilitate this Court’s  
22 review of the claimed compliance. That said, WEG appreciates the fact that the FDs will  
23 presumably – at some future point – file another Motion to Dissolve that will comply with  
24 basic bedrock principles of motion practice. Of course, WEG will not resist the FDs’  
25 effort to take another bite at the apple on the sole basis that their effort failed to come up

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26 <sup>4</sup> WEG’s recently filed surreply in opposition to the FDs’ Rule 59 motion  
27 explains how the FDs expected that the results of long-term range-wide population  
28 monitoring would test assumptions as to the impacts of forest treatments, and ultimately  
lead to changes and refinements in those treatments. ECF Doc. No. 120 at 4-5.

1 to the mark on their first go-around.

2       However, the FDs' pending Motion to Dissolve – together with the irrational  
3 justifications incorporated into the superceding BiOp's no jeopardy conclusion – is  
4 compelling evidence of the profundity of the problem detected here by the Court: an  
5 astonishing lack of accountability and shirking of responsibility that has played out for  
6 decades, despite various orders from judges of the District of Arizona (including this one)  
7 that were specifically intended to force the FDs into compliance with their obligations  
8 under the ESA. *See for example Center for Biological Diversity v. Norton*, 304  
9 F.Supp.2d 1174, 1180-81 (D. Ariz. 2003) (holding the FWS in contempt, stating that “this  
10 Court cannot ignore the incredible amount of time that has been spent compelling  
11 Defendant to properly perform [its] duties under the ESA,” and that “Defendant's  
12 dismissive attitude toward the [ESA which] . . . created Defendant's current  
13 predicament”). WEG submits that this Court should take this context into account in  
14 connection with future proceedings on a subsequent Motion to Dismiss filed by the FDs.

15       Most importantly, WEG urges the Court to allow it to conduct discovery as to all  
16 relevant factual representations made by the FDs in their future superceding BiOps and  
17 legal memoranda in support of any subsequent Motion to Dissolve before it responds to  
18 any such motion. Discovery is appropriate for two reasons in this case. First, the Ninth  
19 Circuit holds that the “record review rule” of the APA does not apply to ESA citizen's  
20 suit claims like the claim against the USFS in this case. *Western Watersheds Project*, 632  
21 F.3d at 497, *Washington Toxics Coalition v. EPA*, 413 F.3d 1024, 1034 (9th Cir. 2007).  
22 In line with these decisions, various district courts have allowed discovery in ESA  
23 citizen's suits. *Institute for Fisheries Resources v. Burwell*, 2017 WL 89003 at \*1 (N.D.  
24 Cal. 2017), *Natural Resources Defense Council v. Kempthorne*, 2016 WL 8678051 at \*17  
25 (E.D. Cal. 2016), *Conservation Congress v. U.S. Forest Service*, 2013 WL 2457481 at \*3  
26 (E.D. Cal. 2013). Second, the Ninth Circuit holds that discovery may be taken in support  
27 of claims brought pursuant to the jurisdictional provision of the APA (such as the claim  
28 against the FWS) under certain circumstances, including “when . . . supplementation is

1 necessary to determine if the agency has considered all relevant factors and explained its  
2 decision . . . or . . . plaintiffs have shown bad faith on the part of the agency.” *San Luis &*  
3 *Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 603 (9<sup>th</sup> Cir. 2014), *Public*  
4 *Power Council v. Johnson*, 674 F.2d 791, 795 (9<sup>th</sup> Cir. 1982) (holding that courts will  
5 allow discovery in an APA case if the party seeking discovery “into the thought processes  
6 of administrative decisionmakers” “makes a strong showing of bad faith or improper  
7 behavior”). WEG respectfully submits that the circumstances of this case support a  
8 finding of bad faith. It is clear that this Court is unable to rely on the FDs’  
9 representations in further proceedings, and that WEG should have an opportunity to test  
10 the veracity of all relevant representations through discovery so as to assure that the  
11 Federal Defendant have, in fact, faithfully complied with their duty to prepare a rational  
12 reassessment of the 2012 BiOps’ jeopardy and recovery analysis.

## 13 **VI. Conclusion**

14 The FDs have failed to comply with this Court’s remand instructions to prepare a  
15 rational reassessment of the jeopardy and recovery analysis of the 2012 BiOps. The  
16 superceding BiOp carries forward the same fundamental flaw that led this Court to  
17 impose the injunction – the failure to include a long-term range-wide monitoring  
18 requirement. The justifications offered for this continuing failure are irrational and  
19 unreasonable. WEG respectfully submits (1) that the FDs’ pending Motion to Dissolve  
20 should be denied and (2) that WEG should be given leave to conduct discovery as to the  
21 factual representations that underlie any future Motion to Dissolve filed by the FDs. A  
22 contrary result would reward the FDs for their continuing malfeasance with respect to the  
23 conservation and recovery of the MSO. The injunction should be maintained in place  
24 until the FDs demonstrate that they are acting with the institutional caution that the ESA  
25 requires. Continuation of the decades-long pattern of institutional negligence, and of  
26 managing national forests on the basis of speculation and surmise as to the impact of  
27 forest treatments on MSOs should not be further countenanced by this Court.

1 Dated: November 18, 2019.

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4 Respectfully submitted,

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11 **CERTIFICATE OF SERVICE**

12 I hereby certify that a true and correct copy of this Plaintiff's Opposition to  
13 Defendants' Motion to Dissolve the Court's Injunction Re the Cibola National Forest was  
14 served on counsel of record on November 18, 2019 through the Court's electronic CM-  
ECF system.

15 /s/ Steven Sugarman  
16 Steven Sugarman  
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